IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 685.

JACOB FROHWERK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Supplemental and Reply Brief for Plaintiff in Error.

JOSEPH D. SHEWALTER,
Counsel for Plaintiff in Error.

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The plaintiff in error contends and relies upon the following additional points, to wit:

The main brief treats alone of the power of Congress over free speech and the press. Further there was some conflict between counsel. The said brief was also prepared for publication with the opinion in book form (see inside cover, first page), but it is felt that in the briefest form some errors should be called categorically to the Court.

Errors Occurring on the Record Proper.

1. Quoting literally from a recent decision of this Court: "All the material facts and circumstances em-

braced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

Pettibone *vs.* United States, 148 U. S., 197.
United States *vs.* Cruishank, 92 U. S., 557.
United States *vs.* Hess, 124 U. S., 486.
Britton *vs.* United States, 108 U. S., 199.
Hyde *vs.* United States, 225 U. S., 347-357.

The indictment in this case violates these rules in the following respects: (1) The conspiracy consists in the unlawful agreement; but an overt act (it need not be successful) must also be both alleged and proved, to the commission of the offense. In brief, in the Federal courts, the *unlawful agreement* must be alleged, and this embraces *the terms and means agreed upon.* (2) The overt act, in pursuance of the agreement. This is necessary, as fully explained by Mr. Chief Justice Waite in the Cruikshank case, that the Court may be able from the *indictment itself* to determine *first* the exact terms of the agreement, and *next* whether the overt act was in conformity with the agreement. (See authorities above.)

The first count of the indictment is totally defective in this respect. It charges as follows:

That the defendants were engaged in the publication of a certain newspaper. This simply describes their business and it *may be inferred* that the conspiracy if agreed upon, was to be by and through this publication, but in the language of this Court in the Cruikshank and other cases, it is expressly said "Inferences will not do. Facts must be stated."

The charge of the conspiracy is that they agreed to violate a certain statute, *setting forth its date and*

title. How or by what means to violate? *There is no statement whatever,* and if this indictment, in this respect, fails to notify the defendant of the precise nature of the charge, as required by the constitution, then it is impossible to imagine a case of such failure to inform him of the charge. The articles themselves can not be considered for the purpose of curing the defects.

We know, from the decisions of this Court, that greater strictness is required in charging a conspiracy, than in other cases, yet in ordinary cases would it be sufficient to say that the defendant was guilty of murder, larceny or arson, in violation of a designated statute?

(2) Congress Alone Can Create and Define Offenses.

It is legislation, and in the absence of an Act of Congress, there can be no crime against the United States. ("And the intention of the legislature must be collected from the words they employ." Chief Justice Marshall in U. S. *vs.* Wiltberger, 5 Wheat., p. 95.)

U. S. *vs.* Morris, 14 Pet., 264-275.
U. S. *vs.* Hartwell, 6 Wall., pp. 395-6.
U. S. *vs.* Brewer, 139 U. S., 276.

Congress has passed *one law* and the defendant has been convicted, on each count, *by an entirely different law.* This we proceed to demonstrate.

The act so far as material is as follows:

> "Sec. 3. *Making false reports—causing insubordination, etc.— obstructing recruiting.*—Whoever, when the United States is at war, shall wilfully make or convey *false* reports or *false* statements, with *intent* to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies," etc. (Last italics in the body are added.)

Now, it will be seen that the Act of Congress is directed not only against reports or statements "*wilfully*" made or conveyed, next *false* reports or *false* statements. And it is not such false reports and false statements alone that constitute a crime, but reports and reports of that character made "*with intent*" to interfere with the operation or success of the military and naval forces. *So that, to constitute a crime under this act the following must concur.*

(a) The statements must be *wilfully* made or conveyed.

(b) They must be *false* reports or *false* statements.

(c) They must be with the *intent* to effect the criminal purposes prohibited by the statute.

Now, if this indictment is examined, it will be found that it charges none of these elements, except the first, that they were wilful. Learned counsel for the Government, in the oral argument concedes this, and contends that the charge that they were *wilfully* made covers the criminal intent required. This is a fundamental error on general principles, and even if it were true, it would not help the Government. For Congress having required that the act should first be *wilful* then *false*, and then having provided for a *criminal intent*, in order to constitute a crime, the latter requirements can not be eliminated from the definition. If it could in one case then another prosecution in another case against a defendant might include the *intent* and omit the charge of *wilful*. Under our constitution laws are uniform throughout the United States. They are declared to be the supreme law of *the Land*, and as said by Mr. Chief Justice Marshall, in an early case, "The land" includes the States and their territories. And as it was an old saying the length of every chancellor's foot laid down a new rule, the pleasure of the United States attorney would lay down a different law in each district.

The Indictment.

After the formal allegations of the declaration of war, and that the defendants were engaged in the publication of a certain newspaper, the second and subsequent counts charge:

> "That they the said Carl Gleeser and the said Jacob Frohwerk, did then and there unlawfully, wilfully and feloniously *prepare*, print, publish, distribute and circulate in and by means of and as a part of a certain newspaper known . . . certain statements and certain *reports*, communications, articles and alleged news items, the said newspaper then and there being a newspaper," etc.

It is thus seen that nowhere in the indictment are the reports and statements charged to be *false*, or made with *intent*, to effect the unlawful purpose. So that, under this indictment, it is only necessary to prove that the statements were made **wilfully**: that is, according to the well settled definition of the word **intentionally** and not by accident or mistake. This *intention* does not imply a *criminal intention*. To illustrate: A man may pass a counterfeit bill. It does not follow that he did so with a criminal intent. Yet, he passes the bill *intentionally*, and not accidentally, to pay a lawful demand. He may show that he received the bill in good faith from a bank or otherwise, and passed it without any knowledge that it was a counterfeit. A man may hold a power of attorney to execute notes for another, under certain circumstances. He may, in good faith, mistake his power and draw a note unauthorized; or he may draw a note in ignorance of the fact that his principal had died, at a distance. Each act is wilful; that is, not through accident. But there is no crime in either case, by reason of the absence of a criminal intent.

But above all this, Congress has made certain things a crime or offense. Every accused person must be brought within the purview of that statute. This has not been done and under the view taken by the indictment any publication which is made wilfully, that is intentionally, and which the Government contends may have an injurious effect, is a criminal act. In justice to the author of this bill it should be stated that Congress has passed no such law. The rule is universal.

> "And the fact that the statute in question, read in the light of the common law, and other statutes on the like matter, enables the Court to infer the intent of the legislature does not dispense with the necessity of alleging in the indictment all facts necessary to bring the case within that intent."
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> U. S. *vs.* Carll, 105 U. S., p. 612.
> Gibbons *vs.* U. S., 153 U. S. p. 587.
> U. S. *vs.* Quincy, 6 Pet., 445, l. c. 466.

The last case absolutely settles the present case. There the defendant was charged with fitting out a vessel at Baltimore *with the intent to use the same* against the commerce of other nations. In the opinion it is said (p. 462) that the indictment charges the vessel was fitted out with the "*intent that such vessel should be* employed in the service of a foreign people . . to commit hostilities against a foreign prince," etc. It is said further in the opinion:

> "The intent is a question belonging exclusively to the jury to decide. *It is the material point on which the legality or criminality of the act must turn;* and decides whether the vessel is of *a commercial* or *war like character.*"

It is precisely so in this case. The *falsity* of the statements; the *intent* (even if false) *with which they are made,*

constitute the very gist of the crime, as defined by statutes. In the case cited, the defendant asked an instruction that "If the equipper had no fixed intent to employ her as a privateer" (p. 466), then he should be acquitted. The Court said, "We think this instruction should have been given." In that case, as stated, the intent was expressly charged in the indictment and the Court adds (p. 495): "It is sufficient if the indictment charges the offense in the words of the act." While this last rule has been greatly narrowed and more has been required, yet in the case at bar the offense *is not even charged in the language of the act.*

(3) The Act Under Which the Indictment Is Found Has Not Been Repealed. It Has Been Revised, and Merged in the Act of May 21st, 1918.

See Motion to Dismiss, Tr. 59. Assignment of Errors, page 58, par. 7, and especially points replied on page 80, fourth paragraph.

The *repeal* of an act; the *expiration* of an act by its terms, and the *revision* of an act, by incorporating it into a new act, covering the whole subject-matter, *ends all prosecutions under the old law.* Congress by a general law (Section 13 of the Practice Act) has expressly provided for the first case and declared that the *repeal* of an act shall not prevent the prosecution of pending indictments. This is a criminal statute, *and can not by the courts be extended beyond its express language.* In effect it is a general statute, which is ingrafted unto every *repealing act* and leaves the old law in force as to prior offenses. Congress knew, and must have been conclusively presumed to have known, that prosecutions ended in the other two cases above, and as it failed to embrace the case where a law was *revised* and passed into a new law, it must be held that the old rule, *which ended the prosecution* was not changed

by the 13th section of the Practice Act. The act of May 21st, 1918, professes to cover *the entire subject* embraced by Section 3 of the Act of June 15, 1917, and declares that Section 3 shall hereafter *read as follows.* It then set it out. That is, they passed an entire new section, composed in part of former Section 3. No one questions that under the decisions, commencing with an early case by Mr. Chief Justice Marshall, all prosecutions under the old law by the adoption of the new law fails, and unless all rules are to be set aside, the courts *can not extend the saving clause* of the Practice Act, beyond its express language.

But above all this, the rule is universal—there can be but one expression of the legislative will, over the same subject-matter, *and the last law must prevail.* There is nothing strange in a law being repealed, and then, by a general provision *the date* of the repeal postponed *as to offenses already committed.* But it would be an anomaly that a new Espionage Law could be passed covering, with added offenses, the old law in terms, *and that both should be in effect.* But it is sufficient to say, under settled rules, prosecutions under the old fail and these prosecutions are not kept alive by any statute. Hence, the defendant can not be convicted under the old, because it is merged into the new, and he can not be convicted under the new, because not indicted thereunder, and because it was not in existence at the dates of the alleged offenses, and Congress has taken this identical view in revising what is known as Mann White-Slave Traffic Act, added a saving clause as to existing offenses, thus showing that it was the view of Congress the general statutes do not apply. (Reference not at hand.)

(4) A Jury Tries an Issue of Fact. Without a Plea of Not Guilty There Is no Issue of Fact to Be Tried and a Conviction Is a Nullity. The Court, Therefore, Had no Power to Order a Jury, While the Demurrer Was Pending, to Appear on the 25th of June, When the Argument of the Demurrer Was Set for June 24th. The Motion to Quash Should Therefore Have Been Sustained. (Page 60, Tr.)

This was prejudicial error, because it was a statement by the court as clearly as it made in words, that the demurrer would be overruled, although not then heard, and in fact not read, and furthermore because the defendant as set forth by proper motions of record, had no right or power either to take depositions or subpoena witnesses, without thereby admitting that he and his counsel had acted in bad faith by filing such demurrer, and had no expectations that it should be sustained. There was error, therefore, as shown by the record, in overruling the demurrer late in the evening, entering, the next morning by the court, pleas of not guilty, over the protest of the defendant, because the jury had already been summoned, and then forcing the defendant immediately after these pleas of not guilty, into a trial. Also error, in the same connection, in refusing the defendant his constitutional right to issuing subpoenas for witnesses, unless the defendant would state in advance what he expected to prove by such witnesses.

(5) An Overt Act Is Necessary to the Completion of a Conspiracy.

There cannot be two punishments for the same act. Yet the first count charges certain publications as the overt act, while the second and subsequent counts charge as separate offenses these same articles; thus is there double punishment.

(6) Power of Congress Over Speech and Press.

Counsel who files the brief on that point, wishes to make this addition which in the rush he overlooked. **It is absolutely decisive of the question.** He knew that Mr. Madison introduced the First Amendment to the Constitution. He knew that Judge Parson of Massachusetts wrote the Tenth. And he makes the following statement, on authority of Mr. Chief Justice Waite, in Reynolds *vs.* United States, 98 U. S., p. 164. More accurate authority could not be cited. He says:

"Accordingly at the first session of Congress the amendment now under consideration was proposed, with others, by Mr. Madison."

What have we then on this subject?

First. Mr. Madison introduced the First Amendment in Congress.

Second. In the Virginia Resolutions and his reports, Mr. Madison, the very man who introduced the measure in Congress, said *that it was an absolute prohibition of any power whatever.*

If this is not sufficient, then an argument is fruitless and an attempt to maintain a written Constitution is an idle ceremony. And we here may repeat, what is stated in two places in the brief, that Mr. Madison says that the construction now sought to be put upon the First Amendment is one of the most astounding things that has ever occurred. That it would exhibit first a number of respectable States asserting that no power over speech and press was given; second, as proposing an amendment that no such power should be exercised. (And if any one knew its meaning, it should have been Mr. Madison, its author.)

Third. As actually conceding the power in Congress

and simply providing that the right should not be abbridged.

And counsel here urges the Court to meet this question.

We now ask to make a few observations drawn out by an inquiry by Mr. Justice Pitney. Perhaps Counsel did not get the full import of the inquiry—at least he is unsatisfied with the answer.

Congress has power not only to raise armies but to support armies. Its powers are plenary, subject only to other provisions of the Constitution, by which it is limited. Under this power, as under all other express powers, it may pass all laws "necessary and proper," in the proper sense, to the execution of this power. To understand what it may lawfully do, we must keep *constantly in mind* the following. We must distinguish between *acts*, which impede or directly interrupt either the *raising of an army* or the *supporting of an army*. If conscription is a valid mode of raising armies,—or in fact whether it is or not, perhaps,—if one man should write a letter, or directly go to another, and persuade him to violate the law, and refuse to register, he may be punished. **But what does Congress punish in that case?** Not the letter, nor the speech—for over that subject Congress has absolutely no power—*but it punishes the act* of preventing the enlistment, *regardless of the means*. So, if a man enlists, and he is induced through a letter or speech, to desert both the deserter and the man who induced the desertion may be punished. This power is necessary and proper to the express power.

But every man has the right to discuss public legislation, and hence he may say that conscription is unwise or unconstitutional; war is unnecessary and peace should be declared, and if his purpose is to discuss

public measures, even though it is unwise, unfounded and impolitic, he can not be punished, even though it be the means of preventing a man from enlisting or if enlisted, induce him to desert.

This distinction is clearly pointed out in Reynolds *vs.* U. S., 98 U. S., 145, above. Congress can pass no law affecting religion. Men may believe what they please. As said by Mr. Jefferson, "It is no business of the United States whether a man believes in one God; three Gods; a hundred Gods, or no God." And a man may preach any and all these doctrines; he may perhaps *preach* that every man *ought to be allowed* to have two wives, but if he attempts to carry out that belief, and marries two women, he is guilty. Of what is he guilty? Not of preaching the doctrine, but of practicing.

No state should permit any citizens to preach that certain men should be murdered, certain women violated, certain robberies committed, but certainly no one would contend that if these doctrines were preached, that they could be practiced. Men can not cloak murder and other crimes under the plea that it is religion or freedom of speech. Some men are very bitter towards the Catholics, some against Jews, and some others against Protestants, but all these classes are under the equal protection of the laws, and no set of men, either under a plea of religion or freedom of the press, can organize mobs to destroy these protections of the law. In a word, the right to free religion and to free speech is not a cloak under which crimes can be committed. It is confounding terms and principle to confound the right of public discussion, with an asserted claim that it can produce or protect crime.

It is hoped that the above clearly presents the distinction counsel attempted to make in answering the

inquiry, and we confidently believe that the specific errors, pointed out above, are so clear as to call for a reversal without remanding.

JOSEPH D. SHEWALTER,
Counsel for Plaintiff in Error.

INDEPENDENCE, MISSOURI, *January 29th, 1919.*

Mr. Lindquist makes the following point:

That the First Count of the Indictment is Duplicitous.

The first count attempts to charge two conspiracies to violate Section 3 of the Act of June 15, 1917, as follows: (1) *By wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States;* (2) *by wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service and to the injury of the United States,* when and while the United States of America was at war with the Imperial German Government.

Section 3 of the Act of June 15, 1917, defines three separate and distinct offenses. (1) To wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies. (2) To wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States. (3) To wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States.

In United States v. Dembowski (Sept. 19, 1918), 252 Fed. 894, the indictment alleged that the defendant did "wilfully and unlawfully make and convey false reports and false statements against the United States army and the United States navy, with intent to then

and there interfere with the operations and success of the military and naval forces of the United States, and with intent then and there to promote the success of the enemies of the United States, and did then and there and thereby cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the said military and naval forces of the United States by the members of such service, respectively, . . . and did then and there wilfully obstruct the recruiting and enlistment of the service of the United States to the injury of the said United States," etc.

District Judge Tuttle, in sustaining a demurrer and motion to quash said indictment, said:

> **"It seems plain that each of the acts thus prohibited is separate and distinct in its nature and object, and that the commission of each of such acts constitutes a distinct and separate offense. In my opinion, therefore, they can not be joined in one count of the indictment, but, if alleged therein, must be set forth in different counts."**

We know of no reason why the foregoing rule should not apply to conspiracy to violate the law. There can be no difference as to the constitutional rights of the defendant.

Neither of the second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth counts charge any offense, in that they simply follow the language of the statute.

Foster *vs.* United States, 253 Fed., 841.